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Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

GEORGE F. DENTON, et al., Petitioners,

v.

MIKE HERNANDEZ, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a Federal District Court may dismiss a complaint pursuant to 28 U.S. Code section 1915(d) if it finds the complaint wholly fanciful despite the fact that reliance was not made on judicially noticeable facts, i.e. facts of which are generally known or ascertainable by reference to a readily available, accurate source.

LIST OF PARTIES

When respondent filed his actions, petitioner George F. Denton was director of the California Department of Corrections, Eddie Ylst was superintendent of the California Medical Facility, and Lieutenant Hartman, Sergeants Anderson and Ingle, and Officers Fitzgerald, McIntyre, Perdoni, Price and Tomlinson were serving at the California Medical Facility. Petitioner Paul J. Morris was warden of Folsom State Prison, and Lieutenants Gonzales and Rutherford, Mr. Tomasetti and Officer Lee were serving at Folsom State Prison.

Respondent Mike Hernandez was and continues to be a prisoner confined within the California Department of Corrections.

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GEORGE F. DENTON, et al.,

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v.

MIKE HERNANDEZ,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, George F. Denton, et al., pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 21, 1990, as amended on April 10, 1991.

OPINIONS BELOW

The opinion for the Court of Appeals for the Ninth Circuit and order of amendment are reported at ___ F.2d ___ and is reprinted in the appendix submitted with this Petition. Appendix. The slip opinion is paginated from 4621 through 4633.

The order of amendment filed by the Ninth Circuit on April 10, 1991 and reproduced in the Appendix makes certain corrections in the language of the opinion and denies a sua sponte request by a judge of the Ninth Circuit for an en banc hearing. Appendix.

This matter has been presented to this Court on petition for certiorari based upon an earlier decision of the Ninth Circuit, Hernandez v. Denton, 861 F.2d 1421 (9th Cir. 1988) hereinafter Hernandez I. This Court granted the petition and remanded the matter to the Ninth Circuit for further consideration in light of Neitzke v. Williams, 491 U.S. ___, 109 S.Ct. 1827, 49 CCH S.Ct. Bull. B2245 (1989). The instant opinion is the result of that remand. The unamended opinion is Hernandez v. Denton, 919 F.2d 573 (9th Cir. 1990).

JURISDICTION

The Ninth Circuit rendered its opinion and entered judgment on November 21, 1990. The Ninth Circuit, after consideration of a sua sponte request for en banc hearing by a justice of the circuit and briefing by the parties on

the desirability of en banc hearing, denied such a hearing on April 10, 1991. This petition is filed within 90 days of that date.

The jurisdiction of this court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. section 1254(1).

STATUTE INVOLVED

The statute involved is subdivision (d) of 28 U.S.C. 1915, related to proceedings in forma pauperis, which reads as follows:

> "The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious."

STATEMENT OF THE CASE

Prior to 1986, respondent, a state prisoner proceeding pro se, had filed five separate civil rights complaints pursuant to 42 U.S.C. section 1983. On April 17, 1986, the magistrate of the United States District Court for the Eastern District of California filed findings and recommendations that these complaints be dismissed pursuant to 28 U.S.C. section 1915(d). On May 5, 1986, the district court entered judgment against respondent.

The various allegations in these complaints are set out in some detail in the dissent to the Ninth Circuit's 1988 decision. Hernandez v. Denton, 861 F.2d 1421, 1433-1438 (9th Cir. 1988). For purposes of this petition the important allegations are that respondent was raped 28 separate times over a period of more than two years in two separate prisons without once knowing at the time that he was being raped. Respondent claims that these assaults occurred at Folsom Prison and the California Medical Facility and were committed by both inmates and correctional officers, but he alleges no fact capable of establishing that any of the named defendants assaulted him. He has no personal recollection of any of the assaults but deduces that they occurred from his claimed discovery of fecal and semen stains on his T-shirts and perceived needle wounds on his arms and legs. Respondent has been diagnosed as requiring psychiatric treatment and is presently a patient at the Atascadero State Hospital. Id. at 1436-1438; Hernandez v. Denton, __ F.2d __, slip opn. at 4626, 4630, hereinafter Hernandez II.[1/]

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1. The transcript of Mr. Hernandez's own version of an assault is contained in a published opinion issued on April 10, 1991. Hernandez v. Ylst, ___F.2d___, No. 88-6459, slip opn. at ftn. 4, 4589-4591 (9th Cir. 1991). Mr. Hernandez, on habeas corpus after a state court criminal conviction, sought to have the conviction overturned because the trial court had not instituted proceedings to determine his competency to stand trial. Id. at 4588. The Ninth Circuit ruled that there was no substantial doubt of competency. Id. at 4589. Inter alia, Mr. Hernandez cited his trial court statement regarding

Respondent appealed the dismissal of his cases to the Ninth Circuit, and on November 23, 1988, that court reversed the district court and held, among other things, that the district court could not dismiss the rape allegations under section 1915(d) on the ground that a court may find a complaint "wholly fanciful" and without substance in law or fact only if the facts alleged are impossible in light of a judicially noticeable fact and that the court could not take judicial notice that none of these alleged rapes occurred. Hernandez v. Denton, 861 F.2d 1421, 1426-1427 (9th Cir. 1988).

This Court vacated the 1988 opinion and remanded the matter for further consideration in light of Neitzke v. Williams, 491 U.S. ___, 109 S.Ct. 1827 (1989). The Ninth Circuit issued a second opinion on November 21, 1990, and denied en banc hearing on April 10, 1991. This decision, Hernandez II, is neither sound law nor consonant with this Court's 1989 order on remand. The present decision does not comport with Neitzke and will adversely affect the ability of district courts to handle the growing problem of prisoner pro se litigation because, as a practical matter, it admits of no discretion in the District Court to dismiss a fantastic complaint as frivolous under 28 U.S.C. section 1915(d).

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the in-custody rapes as proof of his own incompetency. Id. at 4589-4591, ftn. 4.

ARGUMENT

THE GRANTING OF CERTIORARI IS NECESSARY BECAUSE THE NINTH CIRCUIT'S DECISION IN HERNANDEZ II FAILS TO CONFORM WITH THIS COURT'S DECISION IN NEITZKE AND THEREFORE THE NINTH CIRCUIT HAS FAILED TO COMPLY WITH THIS COURT'S 1989 REMAND ORDER

This case concerns the dismissal of Mr. Hernandez's complaint because it contained, in the district court's opinion, that the rape allegations in the complaint were frivolous under 28 U.S.C. section 1915(d). The allegations were that he was homosexually raped 28 times at both Folsom Prison and the California Medical Facility, Vacaville. Mr. Hernandez, based on his "sleeping late and finding fecal stains on a tee-shirt" (Hernandez I, supra at 1435), and needle marks (Hernandez II at 4630; Appendix, p. A-12), concluded that certain correctional personnel, including the warden of the prison, were responsible for the rapes. See also, Hernandez v. Ylst, __ F.2d ___, No. 88-6459, slip opn. at ftn. 4, 4589-4591 (9th Cir. 1991). Mr. Hernandez had no personal recollection of having experienced these assaults. Hernandez II at 4630; Appendix, p. A-12.

The Hernandez II opinion rejects the possibility that a dismissal for frivolity may be based on "law, human

behavior, or permissible inferences" (Hernandez I, supra at 1429) and arbitrarily and without authority adopts a standard more restrictive that announced in Neitzke. In doing so, the Ninth Circuit failed to do what this Court ordered in 1989, i.e. reconcile and conform its decision to this Court's holdings in Neitzke. Instead, the Ninth Circuit has issued an opinion which distorts Neitzke and the leading Circuit precedent, Franklin v. Murphy, 745 F.2d 1221 (9th Cir. 1984), and evades the uniform and simple rules governing the interpretation of section 1915(d).

Clearly the Ninth Circuit did not misapprehend the issues. Hernandez II at 4626-4627 states:

> The Supreme Court in Neitzke said that under section 1915 judges may dismiss as frivolous not only claims based on patently meritless legal arguments, but those premised on baseless factual allegations as well. This holding is fully consistent with the prior law of this circuit. See Franklin, 745 F.2d at 1227. The defendants now focus on the Supreme Court's statement in Neitzke that examples of baseless factual claims are "fantastic or delusional scenarios." 109 S.Ct. at 1833. The defendants ask us to hold that Hernandez['s] allegations of 28 rapes are "fantastic or delusional scenarios," and affirm the district court's dismissal.

However, Hernandez II interprets Neitzke to state that a claim cannot qualify as patently[2/] "delusional" or "hallucinatory" unless it rests upon facts which the court knows could not have occurred. The Ninth Circuit concludes that unless these foundational facts are amenable to judicial notice under Rule 201(b) of the Federal Rules of Evidence as generally known or capable of ascertainment by reference to accurate sources, no case may be dismissed under section 1915(d) and Neitzke. Hernandez II at 4627; Appendix, p. A-8.

Framed in this fashion, the conclusion in the instant case is foregone. Because the Ninth Circuit could not "conclude that the plaintiff's claims of rape are contrary to any facts that are 'generally known' [or] ascertain the truth of the [plaintiff's] allegations by looking to any readily available, accurate source," the Court held that the district court had erred in dismissing the rape claims.[3/]

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2. It is unclear where the "patent" language came to modify "delusional" or "hallucinatory" with regard to section 1915(d). Neitzke makes reference to a "patently insubstantial complaint" being liable to dismissal under Rule 12(b)(6) and not section 1915(d). Neitzke, supra at ftn. 6, B2254.

3. The Ninth Circuit's own opinion issued on the same day as the instant case order involving the same Mr. Hernandez (Hernandez v. Ylst, supra at ftn. 1) should be susceptible of judicial notice in this case. That case involved Mr. Hernandez's assertion that his prior statement regarding in-custody rape was proof of his own incompetency. Id. at 4589, 4591. This would seem to be

Hernandez II, supra. Further, the Ninth Circuit rejected the concept that the aggregate of 28 rapes amounted to frivolity and stated (Hernandez II, supra):

> If we were to affirm the district court's dismissal of all the claims as factually frivolous . . . , we would have to hold that all 28 rapes were delusions and that none of them occurred. While it is hard to believe that so many similar incidents actually happened, we cannot say that none of them occurred without making the kinds of credibility determinations that are impermissible in deciding whether a claim is baseless under section 1915.[4/]

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a significant fact, readily determinable from an unimpeachable source, that could be taken into account when deciding whether "all 28 rapes" alleged in the Hernandez II complaint were delusional. Yet although Hernandez v. Ylst refers to the "amaranthine" Hernandez II suit (id. at ftn. 1, 4586-4587), Hernandez II does not refer to the Ylst case. Moreover, there is no reasonable explanation why the Ninth Circuit's unpublished opinion involving Mr. Hernandez (Hernandez v. Whiting, No. 88-6743, 1991 U.S. App. Lexis 3282 (9th Cir. Dec. 7, 1991)) would not also have provided some cognizable facts under the Hernandez II judicial notice rule. In Hernandez v. Whiting, the Ninth Circuit found frivolous Mr. Hernandez's contention that he was forced to eat food loaded with heroin.

4. This passage is particularly troubling. The Ninth Circuit seems to be saying that an allegation of 28 rapes is 28 times more credible than an allegation of one

A considered examination of Neitzke reveals the Ninth Circuit's misinterpretation of that case. We should not have to cite to an objective source in order to conclude that Mr. Hernandez's 28 rapes could not occur. The discretion accorded to our trial courts in the light of human experience should be sufficient to ratify allegations so "hard to believe." Under the guise of reconciliation with Franklin and its progeny, the Ninth Circuit has eviscerated the clear holdings of Neitzke and created its own idiosyncratic interpretation of section 1915(d).

The Ninth Circuit, in the years before Neitzke, held that the "legal component of the 1915(d) frivolity standard is . . . similar to the test for dismissal of pro se complaints for failure to state a claim." Franklin v. Murphy, supra at 1228. Moreover, Franklin holds that a complaint may be dismissed as frivolous even if it states a claim, including those "postulating events and circumstances of a wholly fanciful kind." Id., quoting Taylor v. Gibson, 529 F.2d 709, 717 (5th Cir. 1976). Finally, Franklin also holds that a

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because the allegation of 28 increases the likelihood that the complainant is telling the truth. In short, the Court appears to be saying that because a single rape may have occurred in any given case, it is 28 times harder to find that 28 didn't occur. This is nonsense. Inter alia, the Court must have made a forbidden "credibility judgment" in assuming that an allegation of one rape under the given circumstances was likely enough to survive the frivolity test. Finally, the passage assumes that all credibility judgments are forbidden under Nietzke and Franklin, when in fact it appears that this rule appears ex visitatione dei in Hernandez II.

defense inferable from the record may be a basis for dismissal. Franklin, supra at 1228.

Neitzke itself states that a complaint is "frivolous" on its facts if the allegations are "fanciful". Neitzke, supra at B2252. The district courts are authorized, within their discretion, "to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless." Id. at B2254. These factually deficient allegations comprise a class of "fantastic or delusional scenarios." Id. The language does not forbid subjective evaluations within the discretion of the district courts.

The reader of both Franklin and Neitzke will be at a loss to explain the genesis of the holding in Hernandez II that judicial notice is the exclusive means by which judgments about the fancifulness, fantasticality, or delusionality of allegations can be made. As stated in the dissent in Hernandez I, Franklin at best is authority for two separate possible bases for dismissing a complaint as frivolous, the "wholly fanciful" and the "judicial notice" test. Hernandez I at 1430 (Aldisert, J., dissenting). Indeed, the dissent in Hernandez I sets forth a careful explanation of why judicial notice alone cannot be the rule and the majority opinion in Hernandez II makes no attempt to deal with the dissenter's cogent arguments.

The implication of the exclusive use of judicial notice is that district courts cannot be trusted with discretion in this area and that a wealth of judicial experience cannot be

brought to bear on any given complaint.[5/] This must be the basis of the majority's forbidding of "credibility judgments." Surely the majority does not use the term as one of art, as no party urges that the matters alleged be finally decided based upon the sworn evidence brought before it. Rather, the majority engages in hyperbole and utilizes "credibility" when it means "probity." It is not scripture that certain allegations pass the bounds of rationality, but such judgments may be made on experience. Was the district court in this case required to cite an authority that Mr. Hernandez produces clearly baseless allegations, or that people with Mr. Hernandez's mental problems in general produce delusional accusations? There is no authority in either Franklin or Neitzke for such cumbersome and absurd mental gymnastics. Neitzke refers only to the discretion[6/] of the district courts with regard to

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5. In In re Amendment to Rule 39, __U.S.__, 1991 U.S. Lexis 2431 (Apr. 29, 1991) and In re Sindram, _ U.S.__, 111 S.Ct. 596, 598 (1991), this Court stated that abusive, repetitive applications for relief by a single individual would be held frivolous. The basis for these holdings is clearly a concern with the flood of frivolous complaints clogging the lower courts. Mr. Hernandez's case would be an opportunity for this Court to place as reasonable a limitation on the individual complainant with multiple fantastic allegations as this Court did on the individual who files multiple complaints.

6. We need not fear the untrammeled exercise of discretion by the district courts. Review of frivolity dismissals is de novo on appeal. Jackson v. Arizona, 885 F.2d 639, 640 (9th Cir. 1989).

"fantastic or delusional scenarios, claims with which federal district judges are all too familiar [Emphases added]." Id. at B2254.

Hernandez II does little to comply with this Court's order to consider the instant case in light of Neitzke. In fact, by engrafting an exclusive judicial notice test upon Neitzke, Hernandez II ensures that no cases with outlandish allegations could ever be dismissed for frivolity.[7/] Rather than allowing a district court to "pierce the veil of the complaint's factual allegations," the Ninth Circuit has removed all discretion with regard to frivolity based on factual allegations. Given that this is the second round of Supreme Court litigation on this subject, this Court should be concerned with the grudging and nominal compliance on the part of the Ninth Circuit with this Court's original order to conform Hernandez I to Neitzke. As stated by the dissenter, "The Supreme Court sent us a message by unanimous action [and] I am not at all certain that the majority have opted to hear it, let alone heed it." Hernandez II at 4629 (Aldisert, J., dissenting) (Appendix,

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7. The Ninth Circuit has in fact allowed exceptions to its own harsh rule, but, it appears, only in unpublished cases. Hernandez v. Whiting, supra, another of Mr. Hernandez's cases involved the alleged forced feeding of heroin-laced food. The Ninth Circuit found the Whiting case frivolous. Similarly, the Ninth Circuit found frivolous allegations that the government had made an inmate the experimental subject of gassing experiments (Morris v. FBI, No. 90-55813, 1991 U.S. App. Lexis 1296 (9th Cir. Jan. 28, 1991). The analogy to the instant allegations is strong.

p. A-11). A reading of Hernandez II indicates that the "message" must at least be repeated by this Court to ensure that it finally gets across.

CONCLUSION

The decision in Hernandez II places unwarranted restrictions upon the discretion of the district courts in dismissing actions under section 1915(d) contrary to the plain meaning of Neitzke. Hernandez II does not conform to the spirit or letter of this Court's 1989 remand order and certiorari must once again be granted to ensure that this Court's mandates are obeyed in a uniform manner by all the Circuits.

DATED: May 24, 1991

Respectfully submitted,

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Mike Hernandez, Plaintiff-Appellant, v. George F. Denton, Director of Corrections; Paul J. Morris, Warden, Eddie Ylst, in his official and individual capacity; Mr. Hartman, Defendants-Appellees.	Nos. 86-2139 87-1693/1694 D.C. Nos. CIV S-83-645-LKK CV-S-83-1348-LKK CV-S-85-0084-LKK ORDER AND AMENDED OPINION

On Remand from the United States
Supreme Court

Filed November 21, 1990
Amended April 10, 1991

Before: Ruggero J. Aldisert,* J. Clifford Wallace and Mary M. Schroeder, Circuit Judges

Opinion by Judge Schroeder; Concurrence by Judge Wallace; Dissent by Judge Aldisert

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*Honorable Ruggero J. Aldisert, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

SUMMARY

Courts and Procedure

Affirming in part, reversing and remanding a district court judgment of dismissal, the court of appeals held that appellant should be permitted to amend his claims to provide more specific recitations of those facts alleged to have violated constitutional standards.

Appellant Mike Hernandez, a prisoner, brought suits in forma pauperis against prison officials alleging a violation of his eighth amendment rights, procedural due process violations, claims of rape, other physical abuse, and deprivation of footwear. The district court dismissed all the claims as frivolous. In a first appeal, the court unanimously affirmed the district court dismissal of Hernandez' procedural due process claims, and his claim that prison officials violated his eighth amendment rights. The court held that no amendment could cure the defects in those allegations. However, the majority also reversed dismissal of Hernandez' claims of rape and other physical abuse, holding that it was improper for the district court to dismiss a pro se complaint as frivolous under 28 U.S.C. § 1915 unless claims were patently meritless, i.e., having no arguable substance in law of fact. The Supreme Court, however, vacated the disposition in this case and remanded for further consideration in light of *Neitzke v. Williams.* In that case, the Supreme Court held, as the majority of the court originally held in this case, that the standard of frivolousness is not the same as the Rule 12(b)(6) standard, and that a complaint should not be dismissed under section

1915 simply because it fails to state a claim. The Supreme Court stated that a complaint is frivolous when it lacks an arguable basis either in law or fact, and that section 1915 embraces not only the inarguable legal conclusion, but also the fanciful factual allegation.

[1] Because Hernandez' allegations that he was drugged and raped twenty-eight times by inmates and prison officials lacked factual recitations of time and place and persons responsible, the complaints failed to state rape claims upon which relief could be granted under Rule 12(b)(6). Nevertheless, because Hernandez' allegations raise constitutional concerns, the claims were not patently without legal substance. Although the claims involved some exaggeration, a majority of the court was unable to say with certainty that none of them occurred, and that the claims were therefore lacking in any factual basis so as to be deemed fanciful under section 1915(d). The appellees asked for reconsideration of that ruling in light of the Supreme Court's remand. [2] Appellees focused now on the Supreme Court's statements in *Neitzke* that examples of baseless factual claims are "fantastic or delusional scenarios." However, were the court to affirm the district court dismissal of all the claims as factually frivolous, the court would have to hold that all twenty-eight rapes were delusions and that none of them occurred. The court could not say that none of them occurred without making the kinds of credibility determinations that are impermissible in deciding whether a claim is baseless under section 1915. [3] Under *Neitzke*, the court did not believe that a claim could qualify as patently delusional or hallucinatory unless it rested upon facts that the court knew could not have

occurred. The court could not conclude that Hernandez' claims of rape were contrary to any facts that are generally known, nor could the court ascertain the truth of the allegations by looking to any readily available, accurate source. Thus, the court concluded that the district court erred in dismissing the rape claims at this stage of the litigation as fanciful. [4] Hernandez should be permitted to amend the claims to provide more specific factual recitations of the time and place of each of the rapes and conduct on the part of prison officials that violated his constitutional rights. Only when it is clear that a claim lacks legal or factual basis may it be dismissed as frivolous. It was not yet apparent that those claims lacked either legal or factual basis.

Judge Wallace concurred for the reasons stated in his prior concurrence.

Dissenting, Judge Aldisert stated that no amendment of facts could cure the claims advanced by Hernandez, given the detailed facts already set forth, the theory advanced, and the inferences required. Judge Aldisert would affirm the judgment of the district court essentially for the reasons set forth in his previous separate opinion.

COUNSEL

Richard W. Nichols, McDonough, Holland & Allen, Sacramento, California, for the plaintiff-appellant.

Richard Thomson, Supervising Deputy Attorney General, Sacramento, California, for the defendants-appellees.

ORDER

Upon filing of the Opinion on November 21, 1990, a sua sponte request for en banc was made by a Judge of this circuit. The parties filed simultaneous briefs setting forth their respective positions on whether the case should be reheard en banc. The full court voted on whether to take the case en banc and the majority voted not to take the case en banc. The petition for rehearing en banc is rejected.

The Opinion of Judge Schroeder filed on November 21, 1990 is amended as follows: on slip Opinion page 14375, first full paragraph, omit the first sentence beginning "The appellant should" and ending with the word "standards." In that same paragraph, following the citation to "Neitzke", insert "Jackson v. Arizona, 885 F.2d 639, 640 (9th Cir. 1989)."

OPINION

SCHROEDER, Circuit Judge:

The Supreme Court vacated our original divided disposition in this case, reported at 861 F.2d 1421 (9th Cir. 1988) and remanded for further consideration in light of Neitzke v. Williams, 491 U.S. __, 109 S.Ct. 1827 (1989). We have given further consideration after requesting briefs from the parties as to the bearing of that decision on this case.

The appellant, Mike Hernandez, is a prisoner proceeding in forma pauperis in suits against prison officials. At issue are the district court's dismissals of complaints alleging 42 U.S.C. § 1983 violations. The district court dismissed all the claims as "frivolous" under 28 U.S.C. § 1915(d) and Hernandez appealed.

In our original opinions, we unanimously affirmed the district court's dismissal of plaintiff's procedural due process claims and his claim that prison officials violated his eighth amendment rights by depriving him of a mattress for one night. We held that no amendment could cure the defects in those allegations. See Franklin v. Murphy, 745 F.2d 1221, 1228 n.9 (9th Cir. 1984). Those rulings are not affected by the subsequent grant of the defendants' petition for certiorari.

In the original opinions, a majority also reversed the district court's dismissal of Hernandez' claims of rape, other physical abuse, and deprivation of footwear. The majority held that it was improper for a district court to dismiss a pro se complaint as frivolous under section 1915 unless claims were "patently meritless." We also held that the standard of "frivolousness" of section 1915(d) is not the same as the Federal Rules of Civil Procedure 12(b)(6) legal standard for dismissal for failure to state a claim. Hernandez, 861 F.2d at 1425. Relying upon this court's decision in Franklin, we held that a pro se prisoner complaint may not be dismissed under section 1915 unless it has no "'arguable substance in law [or] fact.'" Hernandez, 861 F.2d at 1425, quoting Franklin, 745 F.2d at 1227.

The Supreme Court has no held in Neitzke, as a majority of us originally concluded in this case, that the standard of "frivolousness" is not the same as the Rule 12(b)(6) standard, and that a complaint should not be dismissed under section 1915 simply because it fails to state a claim. The Supreme Court cited with approval our decision in Franklin v. Murphy in holding that a complaint is frivolous when "it lacks an arguable basis either in law or in fact" and that section 1915 "embraces not only the inarguable legal conclusion, but also the fanciful factual allegation." Neitzke, 109 S.Ct. at 1831.

In this case, the most troublesome allegations are appellant's claims that he was drugged and homosexually raped over twenty times by inmates and prison officials at different prisons. Because the claims lacked factual recitations of time and place and persons responsible, the complaints failed to state rape claims upon which relief could be granted under the Rule 12(b)(6) standard. Nevertheless, because rape by prison guards or deliberate indifference by prison guards to rape by inmates would raise constitutional concerns, the claims were not patently without legal substance. Although the claims of such repeated similar events undoubtedly involved some exaggeration, a majority of us were unable to say with certainty that none of them occurred and that the claims were therefore lacking in any factual basis so as to be deemed "fanciful" under section 1915(d).

The appellees now ask us to reconsider that ruling in light of the Supreme Court's remand. The Supreme

Court in Neitzke said that under section 1915 judges may dismiss as frivolous not only claims based on patently meritless legal arguments, but those premised on baseless factual allegations as well. This holding is fully consistent with the prior law of this circuit. See Franklin, 745 F.2d at 1227. The defendants now focus on the Supreme Court's statement in Neitzke that examples of baseless factual claims are "fantastic or delusional scenarios." 109 S.Ct. at 1833. The defendants ask us to hold that Hernandez' allegations of 28 rapes are "fantastic or delusional scenarios," and affirm the district court's dismissal. If we were to affirm the district court's dismissal of all the claims as factually frivolous, however, we would have to hold that all 28 rapes were delusions and that none of them occurred. While it is hard to believe that so many similar incidents actually happened, we cannot say that none of them occurred without making the kinds of credibility determinations that are impermissible in deciding whether a claim is baseless under section 1915. See Franklin, 745 F.2d at 1228.

Under Neitzke, we do not believe that a claim can qualify as patently "delusional" or "hallucinatory" unless it rests upon facts which the court knows could not have occurred. The provision for judicial notice in Federal Rule of Evidence 201 provides guidance. It states: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). We accept this as one useful standard in determining

whether a claim is patently frivolous as "founded on wholly fanciful factual allegations." Hernandez, 861 F.2d at 1426 (quotation omitted). We cannot conclude that the plaintiff's claims of rape are contrary to any facts that are "generally known," nor can we ascertain the truth of the allegations by looking to any readily available, accurate source. We therefore conclude that the district court in this case erred in dismissing the rape claims at this stage of the litigation as fanciful.

Only when it is clear that a claim lacks legal or factual basis may it be dismissed as frivolous. Neitzke, 109 S.Ct. at 1331. Jackson v. Arizona, 885 F.2d 639, 640 (9th Cir. 1989). Accordingly, while we affirm the district court's dismissal of appellant's procedural due process claim and his eighth amendment claim based upon deprivation of a mattress, we reverse the district court's dismissal of the remainder of the claims. It is not yet apparent that those claims lack either legal or factual basis.

AFFIRMED in part; REVERSED and REMANDED in part.

WALLACE, Circuit Judge, concurring:

I concur for the reasons stated in my prior concurrence, Hernandez v. Denton, 861 F.2d 1421, 1427 (9th Cir. 1988). For clarification, I eliminate the last ten words of the concurrence.

ALDISERT, Circuit Judge, dissenting:

The issue that divides this panel in this remand from the Supreme Court is whether the allegations contained in a pro se complaint filed by an inmate at the Atascadero State Hospital can ever survive the barrier imposed by 28 U.S.C. § 1915(d) authorizing the district court to dismiss a claim filed in forma pauperis "if satisfied that the action is frivolous." Atascadero is a state hospital for the criminally insane and mentally disordered.

The majority refuse to meet the issue head on and prefer to remand to the district court to permit this obviously very disturbed inmate to file an amended complaint. They conclude that this unfortunate state prisoner should have the opportunity "to amend the claims to provide more specific factual recitations of the time and place of each of the rapes and conduct on the part of prison officials which violated constitutional standards."

I believe that no amendment can save Hernandez' fanciful claims. I reiterate the views set forth extensively in my previous dissenting opinion in Hernandez v. Denton, 861 F.2d 1421, 1427-40 (9th Cir. 1988) (Aldisert, J., dissenting), and would hold that no amendment of facts can cure the claims advanced by Hernandez, given the detailed facts already set forth, the theory advanced and the inferences required. I stated then and repeat now that "[t]he grand purpose of prisoner civil rights petitions under section 1983 . . . should not be prostituted by the hallucinations of a troubled man." 861 F.2d at 1440. I would affirm the judgment of the district court dismissing

the complaint essentially for the reasons set forth in my separate opinion previously published at 861 F.2d at 1427-40. I believe my position in Hernandez has been endorsed sub silentio by the court in its remand to us. In the words of Marshal McLuhan, "The medium is the message."

I.

The Supreme Court sent us a message by unanimous action. I am not at all certain that the majority have opted to hear it, let alone heed it. The Court directed the majority to reconsider this case in light of Neitzke v. Williams, 491 U.S. __, 109 S.Ct. 1827, 54 U.S.L.W. 4493 (1989). Because our previous statement of applicable law -- expressed by both the majority and the dissent -- is on all fours with the Court's decision and opinion in Neitzke, there can be no reason for the Court to have granted certiorari and remanded for reconsideration unless it was troubled with the majority's decision to remand to permit further amendment. Having agreed completely with the majority's statement of the law, the Court would have no purpose for vacating our judgment and remanding unless it was convinced that the dissent was correct in reaching the conclusion that it was impossible to amend the complaint to assert a viable cause of action. Significantly, after reconsideration, the majority proceed as if the Court did not remand this case to us; indeed, the majority opinion responds now only to the contentions of the appellee and does not address any possible concerns of the Court.

I am convinced that my original views, although again rejected by the panel's majority, have now been

endorsed by the unanimous decision of the Supreme Court in granting certiorari and remanding to us.

II.

Accordingly, some summary of the detailed facts alleged in Hernandez' complaint is in order. He claims that he was homosexually raped 28 times at both Folsom Prison and Vacaville. He reached this conclusion because he found fecal stains on his tee-shirt and needle marks on his arms that he believed were "signs of rape." He has no personal recollection of having experienced these assaults. I have previously observed that "[i]rrespective of the outcome of this litigation, it must be acknowledged that Hernandez has established a world record capable of qualifying for the Guiness Book of Records: the only person who has been raped 28 separate times without knowing at the time that this was happening to him." 861 F.2d at 1438.

No possible amendment can cure the fatality of his claim because the circumstantial evidence relied upon cannot as a matter of law rise to the dignity of a cause of action. I previously have demonstrated the fatal flaws of the arguments advanced:

> [H]is complaints are utterly devoid of any allegations establishing the personal involvement of any of the defendants. His contentions depend upon the following prosyllogisms and episyllogisms:

A.

Major Premise: Some needle marks are signs of drug injection.
Minor Premise: I awoke with some needle marks.
Conclusion: Therefore, I was drugged.

B.

Major Premise: One who is drugged can be raped without his knowledge.
Minor Premise: I was drugged.
Conclusion: Therefore, I was raped.

C.

Major Premise: Those correctional officials who are involved in or knowledgeable of inmate rapes are liable.
Minor Premise: Defendants are correctional officials.
Conclusion: Therefore, defendants are liable.

Both fallacies of form and material fallacies inhere in each of these three arguments.

861 F.2d at 1438-39; see also R. Aldisert, Opinion Writing 127 (West 1990). For a discussion of the failures in logic evidenced in these arguments and his companion allegations of rape based on presence of fecal stains and semen on his underclothes, see R. Aldisert, Logic for Lawyers: A Guide to Clear Legal Thinking 141-43, 147-54, 193-207 (Clark Boardman 1989). The brute fact is that no possible amendment of his already "specific factual recitations" can surmount the defects in the theory upon which Hernandez bases liability.

III.

As the majority now suggest, the test of frivolousness is not measured only by dictates of judicial notice. I previously have referred to this court's leading case of Franklin v. Murphy, 745 F.2d 1221 (9th Cir. 1984):

> This analysis sets out three possible standards for dismissing a complaint as frivolous: 1) does the complaint recite bare legal conclusions without supporting facts? 2) does the complaint postulate wholly fanciful events or circumstances? 3) does the complaint conflict with facts of which a court may take judicial notice? (A fourth standard -- redundancy -- was added by Tripati v. First Nat'l Bank & Trust, 821 F.2d 1368, 1370 (9th Cir. 1987) . . . .

As I read Franklin, the "wholly fanciful" and "judicial notice" standards are two separate possible bases for dismissing a complaint as frivolous. Under Franklin, a court may indeed dismiss an action as frivolous if it is "dependent upon allegations which conflict with facts of which a district court may take judicial notice." Schroeder op. at 1426. However, a court may also dismiss as frivolous an action "postulating events or circumstances of a wholly fanciful kind." Franklin at 1228. I find Hernandez' allegations to be indisputably wholly fanciful.

Hernandez v. Denton, 861 F.2d at 1430 (Aldisert, J. dissenting).

IV.

In Neitzke v. Williams, 491 U.S. __, __, 109 S.Ct. 1827, 1832-33, 54 U.S.L.W. 4493, 4496 (1989), the Court has explained:

> Section 1915(d) is designed largely to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions for bringing vexatious suits under Federal Rule of Civil Procedure 11. To this end, the statute accords judges not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's

factual allegations and dismiss those claims whose factual contentions are clearly baseless. Examples of the former class are claims against which it is clear that the defendants are immune from suit, see, e.g., Williams v. Goldsmith, 701 F.2d 603 (CA7 1983), and claims of infringement of a legal interest which clearly does not exist, like respondent Williams' claim that his transfer within the reformatory violated his rights under the Due Process Clause. Examples of the latter class are claims describing fantastic or delusional scenarios, claims with which federal district judges are all too familiar.

I believe that the claims of Hernandez here, a sick man transferred from Folsom Prison to the Atascadero State Hospital for psychiatric treatment, constitute a paradigm of what the Court describes as "fantastic or delusional scenarios, claims with which federal district judges are all too familiar." I am convinced that this is the only reason the Court remanded the case to us.

Accordingly, I continue to dissent and would affirm the judgment of the district court.